U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: California Service Center Date: FEB 25 2003

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Elizabeth Hayward

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate the existence of a new commercial enterprise or a qualifying investment of lawfully obtained funds.

On appeal, the petitioner argues that he has submitted "ample evidence" of a new commercial enterprise and an investment of more than $500,000.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

MINIMUM INVESTMENT AMOUNT

According to the petition, the petitioner's claim to eligibility is based on an investment in three businesses, Bodysmart USA, Inc.; Mobshah; and Falcon's International, Limited, not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. In response to the director's request for additional documentation, the petitioner merged these businesses under a single holding company, Mobshah Group, Inc. On appeal, the petitioner asserts, "under prevailing economic conditions all of USA has become 'targeted area' for employment purposes."

8 C.F.R. § 204.6(e), however, defines a targeted employment area as "an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate." As a targeted employment area must have a high unemployment rate as compared with the national rate, it is not possible for the entire country to be considered a targeted employment area. Thus, the required amount of capital in this case is $1,000,000.

INVESTMENT OF CAPITAL

8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
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> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
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> (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
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> (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
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> (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
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> (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting

or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

On the petition, the petitioner indicated a total investment to date of $200,000 plus. Initially, the petitioner submitted no documentation of an investment. We acknowledge that the list of evidence includes a promissory note for funds, evidence of property purchases, and a schedule of loans. That documentation, however, was not submitted initially. On April 23, 2002, the director advised the petitioner of the evidentiary requirements set forth in the regulations quoted above. In response, the petitioner explained his investment as follows:

Bank Statement of Mobshah Group	$44,200.00
Invoices of Imports	$11,806.50
Pre-Paid Invoice From T. S. Latisons	$150,000.00
List of Inventory	$155,353.47
List of Average Monthly Expenses	$142,000.00
List of Assets	$23,121.61
Addition/Changes Made to House to add 2000 Square Feet Office/Warehouse Space	$32,000.00
Grand Total	$558,481.58

The petitioner submitted a bank letter from BankOne reflecting that, as of July 13, 2002, Mobshah Group, Inc. had a balance of $44,200; invoices and corresponding wire transfer debits from Bodysmart's account for inventory purchased from T. S. Latisons; a list of inventory for all three businesses; invoices for the purchase of inventory; a list of monthly expenses (rent and utilities) amounting to $2360, which the petitioner multiplied by the number of months since the business became operational in May 1997; a list of assets other than inventory supported by a few receipts; and a breakdown of labor and materials costs for improvements "to house." The petitioner did not submit any receipts or contracts in support of the final item and did not identify the "house" being improved.

The petitioner also provided evidence that Falcons International has a line of credit from The Bank of Kuwait and the Middle East and a $500,000 credit line with AmCore Bank. The outstanding balance of the AmCore credit line was $297,300 as of June 20, 2002 and the petitioner had provided a personal guaranty of the debt. Finally, the petitioner submitted a check for $77,335 issued to him for the purchase of Bodysmart's location. The check reflects that Flagstar Bank is the lending institution.

On August 9, 2002, the director issued a notice of intent to deny, noting that the expenses did not amount to an investment of $1,000,000 and were not adequately explained. In response, the petitioner reiterated that he was in the process of investing and provided more detail regarding the above expenses, including that the alterations were made to his residence, which allegedly includes a commercial area. The petitioner submitted a bank statement for Mobshah Group's account at BankOne.

The director concluded that the claimed investment was less than the required $1,000,000. In addition, the director noted that the petitioner had not submitted evidence that the AmCore Bank loan was secured by the petitioner's personal assets and that such assets were amenable to seizure. Thus, the director concluded that those funds could not be considered part of the petitioner's qualifying investment.

On appeal, the petitioner argues for a lesser investment amount based on the assertion that the entire United States is now a targeted employment area. We reject that argument for the reasons discussed above. As stated above, the minimum investment amount in this case is $1,000,000. In addition, the petitioner asserts that the AmCore Bank credit line "is fully guaranteed personally by me and by my personal and business properties present in the USA." As evidence of this assertion, the petitioner refers to the previously submitted bank letter from AmCore Bank. Finally, the petitioner acknowledges that he has not yet invested the full $1,000,000 but asserts that he is actively in the process of doing so.

The petitioner's arguments are not persuasive. That the petitioner has personally guarantied the credit line from AmCore Bank does not convert that loan into the petitioner's personal investment. As quoted above, the definition of capital excludes any indebtedness secured in part by the assets of the new commercial enterprise. The petitioner concedes on appeal that the credit line, while guarantied by the petitioner, is also secured by his U.S. business interests. The record does not reflect that the petitioner has any U.S. business interests other than the new commercial enterprise. Thus, it appears that the AmCore Bank line of credit is at least partially secured by the assets of the new commercial enterprise and cannot be considered part of the petitioner's qualifying investment.

Similarly, the check issued to the petitioner for $77,335 to purchase the Bodysmart USA location identifies Flagstar Bank as the lender. Mortgages are generally secured by the property purchased with the borrowed funds. The petitioner has not presented evidence that the $77,335 is secured solely by his personal assets, and not at all by Bodysmart's assets. Thus, the $77,335 cannot be considered part of the petitioner's personal investment.

The only other evidence of funds being infused into the business is from Ahmad Al Saleh and Sons Company in payment of goods shipped to that company by Falcons International in December 1998. The payment for goods by the company's customer is not a personal investment by the petitioner. In fact, the record does not contain a single wire transfer or cancelled check documenting the transfer of funds from the petitioner to any of his businesses.

The evidence of the business' expenses, outlined above, is also not evidence of the petitioner's personal investment as a corporation has many options for obtaining funding. Each item will be discussed separately.

That Mobshah Group had a balance of $44,200 as of July 13, 2002 is not evidence that those funds originated from the petitioner. The petitioner claims to have been operating at least one of the subsidiaries since May 1997. That the holding company had a balance of $44,200 more than five years after the subsidiaries began operating is not evidence that the petitioner personally contributed that $44,200. The funds could reflect proceeds from sales or loans.

Evidence that the new commercial enterprises purchased inventory is also not evidence that the petitioner personally funded those purchases. While the initial start-up costs of the business include the initial purchases of inventory, subsequent purchases are funded by the proceeds of previous sales and are normal operating costs, not capital expenses. The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations does not include the reinvestment of proceeds. In addition, 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. *See De Jong v. INS*, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997), for the proposition that the reinvestment of proceeds cannot be considered capital. The record does not establish that the initial inventory expenses were incurred prior to the company receiving proceeds for the sale of inventory. Moreover, the petitioner has not established that he purchased the initial inventory with funds he contributed to the business, as opposed to borrowed funds secured by the assets of the business.

Similarly, the monthly expenses for the corporation and its subsidiaries cannot be considered part of the petitioner's personal investment. We do not agree with the petitioner's assertion in response to the director's notice of intent to deny that these five years of normal operating expenses were "obviously" all paid from invested capital. As with inventory, the initial start-up costs include the first few months of rent and utility payments. Once the company begins to earn money, however, those costs are paid as a normal operating expense from proceeds. Thus, we cannot consider the full $142,000 claimed.

The non-inventory assets of the corporation are legitimate capital expenses. These expenses, however, are far less than the requisite $1,000,000. Moreover, the record does not explain the source of the funds used to purchase the assets. For the reasons discussed above, if the assets were purchased with the proceeds of the credit line from AmCore Bank, the purchase of these assets cannot be considered evidence of the petitioner's personal investment.

Finally, the record contains no evidence to support the $32,000 in renovations to the "house." Moreover, the record does not adequately explain how these renovations were purely business related. Without additional information, the petitioner cannot establish that the renovations to his residence represent an investment in the new commercial enterprise.

In light of the above, the petitioner has not demonstrated an investment of $1,000,000, or even the $558,481.58 claimed. The petitioner's argument that he is "actively in the process of investing" is not persuasive. The regulations quoted above require that the money be fully committed to the business and that the petitioner provide evidence of the committed funds. The record does not contain evidence of an irrevocable escrow account from which the petitioner will transfer the remaining investment. The petitioner's personal assurance that he will complete a $1,000,000 investment within two years is insufficient. In both *Matter of Hsiung*, 22 I&N Dec. 201 (Comm. 1998), and *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), it was held that an unsecured promise to pay the remaining investment to the new commercial enterprise was insufficient evidence of being actively in the process of investing. In this case, the petitioner has not even provided evidence of a promissory note issued by him to the new commercial enterprise, let alone evidence that the promissory note is secured according to the requirements set forth in *Matter of Hsiung* and *Matter of Izummi*. Moreover, as will be discussed in more detail below, the petitioner has not submitted evidence that he has accumulated anywhere close to $1,000,000.

Even if the record contained transactional evidence documenting the transfer of funds from the petitioner to the new commercial enterprise, the petitioner would still need to demonstrate that those funds were invested into the new commercial enterprise. The record does not contain audited balance sheets or tax returns certified as filed by the Internal Revenue Service (IRS), including schedule L, reflecting that any money contributed to the corporation was in exchange for an equity interest, as opposed to a shareholder loan.

For the above reasons, the petitioner has not demonstrated either a qualifying investment or that he is actively in the process of investing the requisite investment amount.

SOURCE OF FUNDS

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise,

[redacted]

> property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
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> (iii) Evidence identifying any other source(s) of capital; or
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> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 201, 210-211 (Comm. 1998); *Matter of Izummi*, *supra*, at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, CIV-F-99-6117, 22 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, the petitioner did not submit any evidence of the lawful source of his funds. In response to the director's request for additional documentation, the petitioner submitted his own 1988, 1990, and 1991 Forms W-2; evidence claimed to represent investment income; a letter from Mohammad L. Paul promising to invest $50,000 in the business as part of the petitioner's inheritance; and a letter from Mobina Akram promising to invest $50,000 in the petitioner's business. These letters are not notarized and are not supported with evidence that Mr. Paul is the petitioner's father or that Ms. Akram is the petitioner's wife as claimed.

The director concluded that the above documentation was insufficient. The petitioner fails to address this conclusion on appeal.

The petitioner's wage and tax statements reflect income of $6,923.13 in 1998, $28,490.84 in 1990, and $1,153.84 in 1991. The petitioner did not submit five years of tax returns as required by the regulations quoted above. Thus, it is difficult to determine the amount of income from investments that the petitioner might have earned. Moreover, the petitioner concedes that he is living in the United States without lawful status. He did not answer the question in Part 7 of the petition regarding whether he had worked illegally. Any income derived from unlawful employment or the failure to file and pay income taxes cannot be considered lawfully obtained funds. We cannot conclude that Congress intended to encourage aliens to enter the United States and accumulate their investment funds through unlawful employment and the failure to pay U.S. income taxes. The income acknowledged above in addition to the $20,000 apparently paid by

the petitioner's wife cannot account for the accumulation of the $558,481.58 allegedly invested. The promise from the petitioner's father and wife to contribute an additional $80,000 is insufficient to establish that the remaining investment will derive from lawful sources. Moreover, the record contains no evidence regarding how the petitioner's father and wife obtained the money they are promising to contribute.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.